

FOIA

OLC 78-2635
14 July 1978

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MEMORANDUM FOR: [REDACTED]
Chairman, IRC Working Group

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FROM : [REDACTED]
Acting Chief, Coordination and Review Staff
Office of Legislative Counsel

SUBJECT : Formulation of Agency Position on Legislative
Relief From FOIA

1. This is a follow-up to the discussion at our last meeting at which time the Working Group agreed to address the issues surrounding the Agency's need for legislative relief from the FOI Act. Attached are comments from CIA components on the impact of the Act which were prepared in response to an OLC inquiry several months ago and which are still valid.

2. OLC is principally responsible for formulating Agency legislative positions for presentation to OMB and to the Congress. Our inquiry with Agency components identified problem areas to assist in determining necessary legislative relief. I know that from your experience, you will agree that the concerns vary within the Agency. The IRC Working Group can provide invaluable assistance to OLC by facilitating the coordination needed to formulate sound Agency positions on critical questions. For example, does the Agency wish to seek remedial amendments, a full exemption, or a partial exemption.

3. The Agency has consistently presented its problems with FOIA in its annual FOIA reports to the Congress in Congressional testimony, and in response to inquiries from individual Members. We have the open support of Representative Samuel L. Devine (R., Ohio) and a few other Members of Congress. Chairman Bill D. Burlison (D., Mo.), House Permanent Select Committee on Intelligence, Budget Subcommittee, recently focused on the increasingly heavy administrative costs which the Agency is being required to absorb.

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4. The House Government Operations Subcommittee on Government Information and Individual Rights, the principal Congressional body overseeing the FOI Act, is aware of the problems and plans hearings, early in the next Congress, with Executive Agencies to consider remedial legislation. The Agency must have a firm position for legislative relief cleared with the Administration before we are called upon to testify. CIA played a major role in the veto of the FOIA amendments by President Ford. The present Administration is still reviewing the problems within the Executive Branch but it is doubtful, based on the limited reactions that OLC is able to assess, that President Carter will take the same strong position as did President Ford. Therefore, our arguments for legislative relief must be solidly supported and defensible both to OMB and the Congress.

5. It would be appreciated if you would circulate this memorandum and the attachment to the members of the Working Group for discussion as an item of business at the next meeting scheduled for Thursday, 27 July.

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Attachment:
As Stated

Distribution:
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78-0045/2-01C

14 JAN 1978

MEMORANDUM FOR: Office of Legislative Counsel

FROM : Michael J. Malanick
Acting Deputy Director for Administration

SUBJECT : Amendments to the Freedom of Information Act

REFERENCE : OLC 775748, Same Subject, dtd 30 Dec 77

1. In addition to the suggested legislative modifications (Tab A) that were considered in preparation for the Administrative Practices and Procedures Subcommittee of the Senate Judiciary Committee hearing in September, one major exemption for the Intelligence Community should be considered. It is requested that Congress consider revisions to the Freedom of Information Act that would exempt intelligence organizations from a review and release of documents involved in the collection of intelligence and other covert operations and place the effort on search, review and release of the analysis product. It was the intent of Congress that the Freedom of Information Act would provide enlightenment of the public regarding the activities of the federal government. However, experience to date has shown that most worthwhile documents involve sources and methods, are sensitive or classified and must be denied or sanitized in a manner which may result in a very incomplete or distorted release of information to the public. Further, raw intelligence reports do not necessarily represent an accurate evaluation of the subject. The CIA product from a FOIA request often only provides the requester with a few pieces to a puzzle or information that is misleading or may not reflect the true CIA evaluation of the material. Because of the nature of FOIA, as a matter of policy, we have avoided editorializing on the value of the information released through this channel.

2. Two very clear examples of this are reflected in the information released regarding the Israeli attack on the USS Liberty and the alleged nuclear accident in the Southern Urals. Analysis of this problem was provided in Section 4b of the 2 December 1977 Information and Privacy Staff Weekly Report (Tab B).

3. It is believed that an unnecessary exercise can be eliminated and the true purpose of FOIA achieved by exempting operational reports and documents originated in the collection process and limit the application of FOIA to those finished intelligence and estimative documents that can be released to the public. The shift of manpower to the review and release to the public of the Agency's finished product could fulfill the desired spirit of the Act and better utilize the resources now being expended by the Agency in administering the FOIA. All information collected about U.S. citizens would still be accessible through the provisions of the Privacy Act.

[Redacted Signature]

Michael J. Malanick

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Attachments

Suggestions for Changes or Modification in the FOIA

Response Deadlines

a. Change the mandatory response time on initial processing of requests from present 10 working days to 30 calendar days, plus an additional week for every 100 pages of material requiring a review.

b. Change the mandatory response time on appeals from present 20 working days to 30 calendar days, plus two additional weeks for every 100 pages of material requiring a second review.

Fees

Permit agencies to charge requesters for review time in addition to search time.

Scope of Requests

Limit requests to one specific subject of manageable proportions, rather than permitting blanket, omnibus-type requests which cover a variety of topics, e.g., Morton Halperin's 75-104 with its 44 categories of requested records.

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Approved For Release 2005/03/24 : CIA-RDP81M00980R000200020038-7

16 JAN 1978

MEMORANDUM FOR: Legislative Counsel

FROM: John N. McMahon
Deputy Director for Operations

SUBJECT: Amendments to the Freedom of Information Act.

REFERENCE: OLC Memorandum # 77-5748, dated
30 December 1977.

1. (C) This responds to referent request for comments and suggestions on possible amendments to the Freedom of Information Act.

2. (C) The Directorate has in the past contributed to a number of Agency memoranda concerning the impact of the Freedom of Information Act on Directorate activity. Additional experience in coping with the provisions of the Act has confirmed the observations in those earlier memoranda, among which we note particularly from last year OGC 77-2225 and OGC 77-2759.

3. (C) We further note the nearly 65 percent increase in Freedom of Information requests in 1977 as compared with 1976. Much of the work which is responsive to FOIA requests falls to this Directorate, which has observed that most requests now originate with readily discernible categories of persons. Among them are members of the media. The selective publicity given to portions of material released under the Act has, we know from field station commentary, begun to erode confidence in the Directorate's ability to protect both operational and intelligence information.

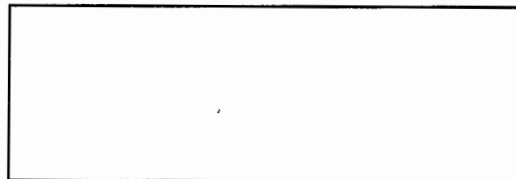
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4. (C) Some misconceptions are associated with the loss of confidence, of course, We cannot hope to dispel all of them. However, a successful legislative achievement of additional protection of operational activity would tend to reassure both actual and potential clandestine assets and foreign liaison services. A form of reassurance becomes especially necessary now that we face the first instance of judicial review of exemptions asserted under the Act by this Directorate in order to protect classified material and sources and methods (Morton H. Halperin v. Central Intelligence Agency, et al.). As you know, the hazard in the case of judicial review is that the court may substitute its own decisions for those of the Agency concerning the propriety of classification or other asserted exemptions. Insofar as intelligence activity of the United States is concerned, it does not seem likely that the legislative intent was that inexperience be substituted for experience in making determinations of this nature. Accompanying this memorandum at Tab A is a summary of recent instances, appropriately sanitized, of the loss of confidence that gives us concern.

5. (C) Previous suggestions regarding procedural clauses of the Act continue to merit consideration for amendatory action. We think, however, that a broader approach may provide more effective relief with respect to protection of sources and methods and classified information. You will recall that, in contrast to the Freedom of Information Act, the Privacy Act, with its laudable goals, authorizes the Director to exempt systems of records maintained by CIA from certain provisions of the Act. Director Colby exempted CIA records systems from some but not all of those provisions. The Privacy and Freedom of Information Acts should be consistent. To achieve consistency, the DCI should be given the same authority under the Freedom of Information Act that he has under the Privacy Act. We suggest that this avenue toward amendment of the FOIA be explored. To that end, I have instructed experienced personnel of the Directorate to provide whatever additional supportive commentary you may find useful.

Attachment: Tab A



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NFAC-161-78

13 JAN 1978

MEMORANDUM FOR: George L. Cary
Legislative Counsel

FROM : Sayre Stevens
Deputy Director, National Foreign
Assessment Center

SUBJECT : NFAC Comments Concerning Amendments
to the Freedom of Information Act

REFERENCE : Your Memorandum, dated 30 December
1977, Same Subject (OL 77-5748)

1. In general, NFAC is supportive of the concepts of the Freedom of Information Act. To date the manhours devoted to servicing FOIA and related requests have not been of a scale to disrupt significantly the intelligence production activities of any NFAC component. Nevertheless, no resources have been provided for FOIA and related activities and all such efforts detract from the basic tasks. Statistics for the year 1977 reflect a significant upward swing over the previous year in the number of FOIA and related requests -- more than 60 percent increase in 1977 compared with 1976 -- being levied on the Agency. This trend holds the distinct probability that NFAC assets will be increasingly diverted from intelligence production activities to handling requests from the public.

2. Having wrestled with FOIA requests for the past several years, NFAC components have surfaced a number of problem areas that can only be resolved by amending or clarifying the existing act. Of particular concern is the matter addressed in a memorandum from the Chief, NFAC Coordination Staff which can be found at Tab A. To be sure, the problem of trust of foreign governments in US secrecy agreements stems more from the climate of the times than it

does from the act itself. Nevertheless, it is a matter of considerable concern to the Center and steps should be taken to alleviate the fears and apprehensions of the foreign intelligence services on whom we depend for information not readily available from other sources and at relatively small cost.

3. The existing climate has also had a negative effect on the ability of CIA to negotiate mutually beneficial contracts with academia. At Tab B is a summary of specifics documenting the impact of FOIA disclosures on our Office of Scientific Intelligence.

4. Other problem areas where relief is sought include:

- No Nationality Restriction

Adding to the request burden are an increasing number of requests from foreign individuals including students and members of the press. Likewise, requests from foreign companies, corporations and institutions seem to be increasing. The US taxpayer bears the cost of such inquiries.

- Definition of Reasonable Request

The present law is too loose on what constitutes a reasonable request. Many requesters want information and research, not documents. Students (as well as the press) use the law to avoid basic research that ought to be a part of their educational process. The burden of matching the relevant document(s) to the request for information falls on the component handling the search. Corporations, in particular, use the law to fish for possibilities of legal actions against other corporations or the federal government itself.

- Fees

The existing schedule of fees that can be charged for search and reproduction should be revised. To charge only \$8 for

an hour of professional time is ridiculous. Also, the Agency should be allowed to take a more stringent approach in deciding when to charge. A revised FOIA law should more clearly define "Public Interest." In any case, the major part of the costs of FOIA actions are in the review of the security classifications rather than in finding and duplicating a specific document. The Congress should at least realize this fact even if the law remains unchanged.



Sayre Stevens

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OLC - 78-0459
OGC 78-0566
20 January 1978

MEMORANDUM FOR: George L. Cary
Legislative Counsel

25X1 FROM :
Office of General Counsel

SUBJECT : Proposed Comments to the Senate
Select Committee on Intelligence re
the Impact of the FOIA on Agency
Activities

1. This memorandum concerns the impact of the Freedom of Information Act on Agency activities and describes some problems faced as a result of the implementation of this law.

2. It will detail the administrative burden faced by the CIA in complying with the Freedom of Information Act, details of the problems encountered in conducting searches, the effect of judicial holdings on CIA's interpretations of the law, and proposed amendments to exemption 7. Additionally, there is a discussion of difficulties encountered in CIA liaison relationships caused by abundance with the FOIA.

3. A significant portion of Agency resources, particularly in terms of the energies of senior management, has been devoted to the administration of the FOIA, while very little information of interest to the public has, in fact, been released through the mechanism of the Act. Unless legislative relief is obtained it can be anticipated that the continued diversion of CIA resources might well impair the Agency's ability to carry out its functions.

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Approved For Release 2005/03/24 : CIA-RDP81M00980R000200020038-7

12 JAN 1978

51C - 78 - 0045

MEMORANDUM FOR: Legislative Counsel

FROM : John H. Waller
Inspector General

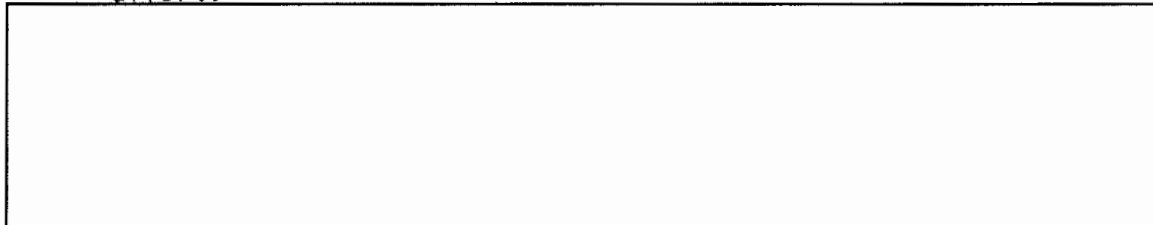
SUBJECT : Amendments to FOIA

REFERENCE : OLC 77-5748, 30 December 1977

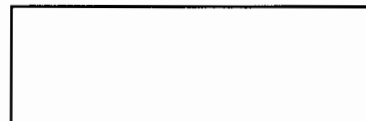
1. In our study last year of the public release of information, we came to two conclusions which bear directly on your question of whether or not FOIA has had a negative or harmful impact on Agency activities and operations. These are:

a. "The Agency has released massive amounts of information into the public domain during the past two years. These releases have resulted in concern and loss of confidence by [redacted] in the Agency's ability to protect the confidentiality of relationships with the Agency."

b. "There is a basic anomaly in making information about a nation's clandestine intelligence organization public. No other nation does this and it is inherently destructive to the long term maintenance of this country's foreign intelligence effort."



2. I believe that the public interest in preventing abuses or illegalities that may be committed by U.S. intelligence organizations is adequately served by the elaborate oversight mechanisms that have been established in the Agency, the Intelligence Community, the White House, and in Congress; by the ability of the courts and Congressional investigating committees to have access to any and all information they require; by the restrictions



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on intelligence activities that have been issued; and by the sensitivity of all concerned to the need to guard against illegal or improper activities. There is not, therefore, a compelling need for FOIA to serve an oversight function. The disadvantages to the national security of applying the FOIA to intelligence agencies, for the reasons cited above, clearly outweigh any merit that may be claimed for public release of information of the kind now required by the FOIA.

3. While I would prefer to see CIA entirely exempted from the FOIA, I believe that there is room within the scope of the present law for the Agency to tighten its practices on information releases relating to intelligence sources and methods and classified information under the provisions of FOIA Exemptions (b)(1) and (b)(3). I recommend, therefore, that amendatory language be drafted which will expand and further clarify these exemptions as they apply to the Intelligence Community.



John H. Waller

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DCI/IC 78-0603

78-0135

13 JAN 1978

MEMORANDUM FOR: George Cary
Legislative Counsel

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FROM:
Acting Deputy to the DCI for the
Intelligence Community

SUBJECT: IC Staff Experience with FOIA

REFERENCE: Your Memorandum for Morning Meeting Participants,
dated 30 December 1977, Subject: Amendments to
the Freedom of Information Act

1. Reference reported that as a result of recent discussions between the Director and the Chairman of the Senate Select Committee on Intelligence, the Office of Legislative Counsel is currently assessing the impact of FOIA and working on possible amendatory language. You asked for comments to assist you in this task, in particular, our position on whether FOIA has had a negative or harmful impact on Agency activities and operations.

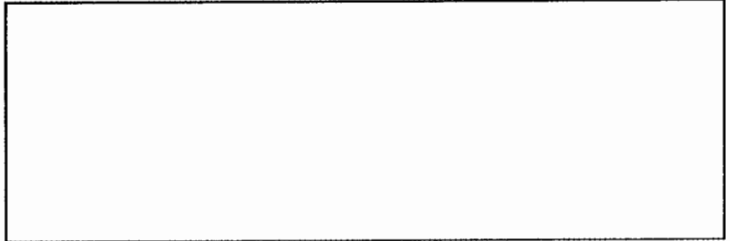
2. The IC Staff has not had a large number of FOIA requests, although some have run to many pages of text. In 1976, for example, we handled an FOIA request for copies of all DCIDs ever published -- more than 200 separate documents. In 1976, the total number of FOIA requests processed by the IC Staff was 21; in 1977 we handled only eight.

3. Many of the FOIA requests referred to the IC Staff have involved documents of historical interest which were eligible for declassification review under E.O. 11652. Other requests for more recent material on the organization and management of the Intelligence Community were prompted by the Congressional investigations and the publication of E.O. 11905. In response to these requests, a considerable body of material has been declassified and released. We believe that release of this type of information has helped to increase public awareness of the role of intelligence in our government.

SUBJECT: IC Staff Experience with FOIA

4. In our experience to date, the exemption criteria of the Freedom of Information Act have been sufficient to enable us to withhold material we determine warrants continued protection, and our denials have rarely been appealed.

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16 January 1978

MEMORANDUM FOR: George Cary, OLC

FROM : Herbert E. Hetu
Assistant for Public Affairs

SUBJECT : Amendments to the Freedom of Information Act

REFERENCE : Memo of 30 December 1977, same subject

1. In addition to the concerns raised by the Director in the referenced memorandum, I believe the Agency's image has suffered unnecessary damage and the public has been misled because of the FOIA requirement to release bits and pieces of information. Three good examples are:

- a. MKULTRA and related programs --- It is impossible to convince the public that these programs had their origins in the Fifties and were terminated in the early Seventies.
- b. Glomar
- c. Israeli firing on the Liberty -- Because of the partial and unevaluated disclosures, the public has reached a conclusion that is contrary to the one arrived at if all the material is taken into account.

2. The Berlin Tunnel operation, NUMEC and the Kennedy assassination are just three FOIA requests and appeals that have potential for similar damage.

Herbert E. Hetu